SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of New Jersey (Fake, U. S. D. J.) was filed on April 29, 1940. It is printed in the Record at page 496, and is reported in 33 Fed. Supp. at page 102.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (Clark, C. J.) has not been officially reported at the time of the filing of this brief, but said opinion was rendered June 30, 1941 and is found in the Record at page 514.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was June 30, 1941 (R. 521).

2. This petition was filed within three months of June 30, 1941.

3. The jurisdiction of the Court to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347).

4. Petitions for writs of certiorari in similar cases have heretofore been granted by this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28; *United States* v. *Andrews*, 302 U. S. 517; and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

III.

Statement of the Case.

A full statement of the case has heretofore been given under heading A in the petition, and in the interests of brevity the statement will not be repeated in the brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Third Circuit erred in holding that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the stat-

utes limiting the time within which Federal income and profits taxes may be assessed.

2. The Circuit Court of Appeals for the Third Circuit erred in ignoring and refusing to follow the findings of fact of the United States District Court for the District of New Jersey to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, was not authorized by his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax, and that such co-trustees had no knowledge of the said waivers.

3. The Circuit Court of Appeals for the Third Circuit erred in denying the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof.

4. The Circuit Court of Appeals for the Third Circuit erred in holding that an amendment to a claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, was untimely and that relief with reference to the matters set forth in said amendment was barred by the statute of limitations.

V.

ARGUMENT.

Summary of the Argument.

Point A. The holding of the Circuit Court of Appeals for the Third Circuit to the effect that less than a majority of

the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which Federal income and profits taxes may be assessed conflicts with the controlling statutes and applicable decisions of the State of New Jersey.

Point B. The holding of the Circuit Court of Appeals for the Third Circuit to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax disregarded and nullified the findings of fact of the District Court for the District of New Jersey, in conflict with the proper interpretation of Section 52 (a) of the Rules of Civil Procedure and with the decisions of other Circuit Courts of Appeals.

Point C. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a Federal question in a way probably in conflict with the decisions of this Court.

Point D. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims but which involved claims concern-

ing which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit and with decisions of the Court of Claims.

Point E. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court.

Point A.

The holding of the Circuit Court of Appeals for the Third Circuit to the effect that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which Federal income and profits taxes may be assessed conflicts with the controlling statutes and applicable decisions of the State of New Jersey.

Under Section 277 (a) (2) and 277 (a) (3) of the Revenue Act of 1926, 44 Stat. 58, the Government is allowed four years after the filing of the return within which to assess income, excess-profits, and war profits taxes imposed by the Revenue Act of 1921 and by such Act as amended, and five years after the filing of the return within which to assess such taxes imposed by the Revenue Act of 1918 and by such Act as amended. (See Appendix D for text of Section 277 (a) (2) and (a) (3).)

By reason of this statute, the taxes, the return of which are sought in the present suit were, concededly, untimely assessed and therefore illegal unless the Government is able to show valid Waivers of the limitation imposed.

Uncontradicted evidence adduced before the District Court showed that the United States Brewing Company, a New Jersey corporation, had voluntarily dissolved on July 10, 1922 pursuant to Section 31 of the Corporation Act of the State of New Jersey, R. S. 14:13-1, and that its affairs then came under the direction of five liquidating trustees, and later, by reason of the death of two of the trustees, under the direction of the remaining three. (See Appendix A for text of R. S. 14:13-1.) The undisputed evidence further showed that five Waivers were signed by William C. Krueger, one of the liquidating trustees, and that this action of Mr. Krueger was without the knowledge of, and without authority from, his co-trustees, or the authorized agent of the trustees, Mr. Hoffmann.

The powers of a corporation in dissolution and the existence or extent of the authority of a given individual to act for such corporation are governed by the statutes and decisions of the State of incorporation, in this case, New Jersey. It is incumbent upon the Federal courts to follow the law of the appropriate State. These principles have been consistently followed in controversies involving the validity of tax waivers where, as here, there was no Federal statute governing the validity of such waivers. *Commissioner of Internal Revenue* v. *Godfrey*, 50 F. (2d) 79 (C. C. A. 2d), *cert. den.*, 284 U. S. 653; *Jaffee* v. *Commissioner of Internal Revenue*, 45 F. (2d) 679 (C. C. A. 2d), *cert. den.*, 283 U. S. 853; *A. J. Bates Co.* v. *United States*, 3 Fed. Supp. 245 (Ct. of Claims); *Southwestern Investment Co.*, 19 B. T. A. 30; *White Eagle Oil & Refining Co.*, 19 B. T. A. 195; *appeal dismissed, Burnett* v. *White Eagle Oil & Refining Co.*, 58 F. (2d) 141; *Farmers & Planters Tobacco Warehouse Co.*, 22 B. T. A. 1331; *T. W. Warner Co.*, 19 B. T. A. 872; *Bam-*

berg Cotton Co., 8 B. T. A. 1236; *Barron-Anderson Co.*, 17 B. T. A. 686.

Moreover, this Court has specifically held, in *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257, that the powers and duties of a corporation in dissolution are controlled by the law of the State of incorporation. Further, in *Glenn* v. *Liggett*, 135 U. S. 533, this Court has held that the rights of the parties in a suit by a dissolved corporation to enforce unpaid subscriptions to stock are governed by the law of the State of incorporation.

As will be shown subsequently, the validity of acts done in behalf of a dissolved New Jersey corporation is determined by statutory enactment, and by judicial construction of the statute. Even before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, it was axiomatic that rules established by State statutes and the construction thereof given by the State court were matters of local law, and must be applied by the Federal courts under the Rules of Decision Act, R. S. Sec. 721, Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92. *Swift* v. *Tyson*, 16 Pet. 1, 18, overruled in the *Erie* case; and *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. 195. Under *Erie R. Co.* v. *Tompkins* the principle obtains *a fortiorari*. (The text of R. S. Sec. 721 is annexed to the brief accompanying this petition and is printed as Appendix G thereto.)

Since, therefore, the validity of the tax waivers at issue is a matter to be determined by the law of New Jersey, it becomes appropriate to examine the law of that State.

Section 31 of the Corporation Act of New Jersey, R. S. 14:13-1, after outlining the procedure in obtaining dissolution, provides:

> "Upon the issuance of such dissolution certificate by the secretary of state the corporation shall thereupon be dissolved, except as hereinafter provided, and the board of directors shall proceed to settle up and adjust its business and affairs, * * *"
>
> (See Appendix A for full text of R. S. 14:13-1.)

Section 54 of the same Act, R. S. 14:13-5, then provides, in part:

> "Upon the dissolution in any manner of any corporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them."
>
> (See Appendix B for full text of R. S. 14:13-5.)

Finally, Section 73 of the same Act, R. S. 14:14-8, provides:

> "Everything required by this title to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority."
>
> (Text of R. S. 14:14-8 also printed as Appendix C.)

These provisions are so explicit in requiring the trustees to act by a majority that on one occasion only have the courts of New Jersey been called upon to decide a controversy involving the necessity of majority action by the trustees of a dissolved corporation. In *In re Delaware, etc. R. R. Co.*, 76 N. J. L. 163 (Sup. Ct.), the General Construction Company, a New Jersey corporation whose charter was forfeited, owned 112,314 shares of the stock of the Delaware River and Atlantic R. R. Co. of New Jersey. Three of its five directors, who had become its trustees under Section 54 of the General Corporation Act, executed a proxy appointing one Thompson to vote the stock owned by the dissolved corporation at an election of the Railroad Company. Subsequently, one of the trustees who had executed the proxy, revoked his assent to the proxy. Nevertheless, the shares were voted by Thompson at the election. As one of its reasons for setting aside the election, the Supreme Court held that the revocation destroyed the efficacy of the prox-

ies, "because they then became the act of only two of the directors, out of five, being less than a majority" (at p. 169).

It is well settled that the Supreme Court of New Jersey, although it is not the highest tribunal of that State, is of sufficient importance to require that its decisions be followed by the Federal courts, in the absence of contrary rulings by the highest State court. *Erie R. Co.* v. *Hilt*, 247 U. S. 97; *North Philadelphia Trust Co.* v. *Smith*, 13 F. (2d) 585 (C. C. A. 3rd); see *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 176, 179, *leave to file second petition for rehearing granted*, 85 L. Ed. 1005 (not officially reported).

Under the New Jersey statutes as judicially construed, therefore, it is apparent that the trustees of a dissolved New Jersey corporation must act by at least a majority. A single liquidating trustee cannot, by his individual act, bind the trustees or the property of the dissolved corporations.

In upholding the validity of the waivers in the present case, though they were executed by only one of three trustees, and though such execution was without the knowledge or authority of the other trustees or of Mr. Hoffmann the Circuit Court of Appeals for the Third Circuit has decided an important question of local law in a way which conflicts with the applicable statutes and decisions of New Jersey.

Even if it be assumed, as the Circuit Court of Appeals indicates, that a dissolved corporation, like an existing corporation, may act through an agent, it is nevertheless clear that in the case of a dissolved corporation such agent, under the New Jersey law, must be authorized by at least a majority of the liquidating trustees. The undisputed evidence demonstrates, and the District Court so found, that William C. Krueger did not possess such authorization.

In any event, it does not appear that the Circuit Court of Appeals based its decision on the premise that Mr. Krue-

ger was authorized by his co-trustees to execute the waivers, though the opinion is not lucid in this respect. Rather, the Circuit Court of Appeals has taken the flat position that from the nature of his office, Mr. Krueger had at least implied power to waive the statute of limitations. Such position is in direct opposition to the New Jersey law.

The factors referred to in the opinion of the Circuit Court of Appeals as bearing on the question of the power to act are obviously of no significance. Thus, the fact that the corporate ownership was, in the main, vested in two families; that the directors were members by blood or marriage of the families; and that William C. Krueger was the son of the founder, cannot possibly operate to confer on Mr. Krueger the power to act after dissolution of the corporation in the face of explicit provisions of the New Jersey law to the contrary. Moreover, the fact that Mr. Krueger signed income tax returns for the years 1918, 1919, 1920, 1921 and 1922 can have no relation whatsoever to the power to sign waivers after dissolution. All returns with the exception of the 1922 return were filed before dissolution of the corporation, and the latter was signed shortly thereafter (R. 22, 23). It is true that a later return, not mentioned in the opinion, was filed for the fiscal year ended March 31, 1923 (R. 23). In all cases, however, Mr. Krueger was merely following the provisions of the Federal statutes requiring the signature of the president, vice-president or other principal officer of the corporation. Section 239 of the Revenue Acts of 1919 and 1921, 40 Stat. 1081; 42 Stat. 259. (The text of these Sections is annexed to this brief and is printed as Appendix H and I, respectively, thereto.) Hence, a signature on such returns could not imply a power of any other nature in the signer, particularly in the case of dissolved corporations governed by the New Jersey statutes. The Court further points to the fact that Mr. Krueger attended a conference in Washington with government rep-

resentatives. The established facts, however, as previously outlined, indicate that Mr. Krueger attended only one conference, the first, whereas Mr. Hoffmann, the authorized representative of the liquidating trustees, attended not only the first, but twenty-five or thirty additional conferences (R. 389-391, 405, 410, 444-445, 172-173, 26). Furthermore, the Government had knowledge of Mr. Krueger's lack of power or authority as is disclosed by its letter of December 19, 1924, as follows:

> "You are requested to have the power of attorney executed by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200-201).

No factual circumstances can serve to avoid the legal requirement of the New Jersey law that the trustees in liquidation of a dissolved corporation must act by a majority. Even if this were not so, however, it is clear that the situation as described by the court, does not in any way tend to show an implied power in Mr. Krueger to act.

In essence, the present problem is simple: Mr. Krueger assumed to act with relation to the Waivers, but did not have the power or authority to act; a majority of the trustees, or Mr. Hoffmann, who had power to act, did not act, and had no knowledge of Mr. Krueger's acts; the Government, with whom Mr. Krueger dealt in executing the Waivers, had knowledge of Mr. Krueger's lack of power and authority.

It should be remarked parenthetically that if the opinion of the Circuit Court of Appeals be construed to hold that Mr. Krueger was in fact authorized by his co-trustees, a less likely interpretation, rather than that he had the power to act by virtue of his position, a basis for granting the writ of certiorari nevertheless exists, as will be demonstrated under Point B herein. The foundation of the decision must be either a finding of power in Mr. Krueger arising from the

nature of his position, or a finding of authority granted by a majority of the trustees. In either event, there is ample ground for the granting of the writ.

An examination of the authorities cited by the Circuit Court of Appeals reveals that none of them are controlling in the present litigation and, furthermore, that some of them, far from supporting the position of the Circuit Court of Appeals, tend to support the petitioners' contentions. All of the cases cited are easily distinguishable on one or more of the following grounds: (1) that the corporation involved was not dissolved at the time of the execution of the waiver, and therefore a State statute regulating the authority to act for a dissolved corporation, if such statute existed, was not applicable; (2) that the official signing the waiver possessed express or implied authority from those in whose hands the conduct of corporate affairs was vested; (3) that elements of an estoppel or an acquiescence existed; (4) that the official signing the waiver was the sole remaining corporate officer; (5) that the State law did not require majority action on the part of those in whose hands the conduct of corporate affairs was vested; (6) that a tax assessment was imposed, not against the dissolved corporation, but against a transferee of that corporation, and such transferee, who had himself signed the waiver, was estopped to deny its validity; and (7) that the validity of the waiver was not challenged on the ground that the person executing it was not authorized to act.

To cite an example, in *Continental Oil Co.* v. *United States*, 14 Fed. Supp. 533, cert. den. 301 U. S. 694, cited in footnote 17 of the opinion of the Third Circuit, the Court of Claims, in sustaining the validity of waivers executed by a corporate official of a dissolved corporation, explicitly points out, at page 538, that:

> "The Arizona statutes, unlike the statutes of most of the states, in that respect, make no provision as to

> who shall act for a dissolved corporation in closing up its business, and the decree of the court dissolving the Mutual Oil Company of Arizona does not designate liquidating trustees. In this situation the only persons who could act on behalf of the dissolved corporation in closing up its business, it still being a going concern for that particular purpose, would be its authorized officials of the date of dissolution. An officer of the corporation who had authority to execute tax waivers on its behalf before dissolution, in the absence of a showing to the contrary, would have like authority to act on its behalf during the period of its extended existence after dissolution for the purpose of closing up the business."

It would seem apparent that the Court of Claims, if confronted with the facts presented in the instant case, would, in the light of the *Continental Oil* case, render a decision directly opposed to the present holding.

Moreover, in 16 *Fletcher, Cyclopedia Corporations* (1933), sec. 8181, cited in footnote 18 of the opinion of the Circuit Court of Appeals, the learned author points out that ordinarily all the liquidating trustees must join in an act, or one must act with the authority of the others, citing, *inter alia, In re Delaware, etc., R. R. Co.*, 76 N. J. L. 163, which was discussed *supra* in this brief.

In view of the fundamental principle that the Federal courts must look to the law of the State of incorporation to determine the existence and extent of the authority to act in behalf of a dissolved corporation, it is not surprising to find a lack of authority in support of the decision of the Circuit Court of Appeals.

The importance of the question presented for the Court's consideration cannot be gainsaid. Not only is the sum of $126,533.90, plus interest, in taxes at issue, but of more vital importance, to the public at large, is the necessity, in this day of expanding governmental power, that the inter-

est of the citizen, and taxpayer, be protected. In times of stress and emergency, the tendency is almost universal, and understandably so, to favor the position of government at the expense of the individual. Nevertheless, it is of the essence of free government that the individual is entitled to all the protection given him by law. To secure such protection, there exists fortunately access to the courts.

The large number of cases which have arisen, involving the validity of tax waivers executed on behalf of a dissolved corporation, as well as the somewhat loose thinking frequently found in opinions on the subject, emphasizes the need for a definitive pronouncement by this Court. It is believed that a source of much wasteful litigation will be eliminated by a decision in the present matter.

Point B.

The holding of the Circuit Court of Appeals for the Third Circuit to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax, disregarded and nullified the findings of fact of the District Court for the District of New Jersey, in conflict with the proper interpretation of Section 52 (a) of the Rules of Civil Procedure and with the decisions of other Circuit Courts of Appeals.

It is possible, as pointed out in Point A, *supra*, that the decision of the Circuit Court of Appeals for the Third Circuit is based on the premise that William C. Krueger, in waiving the statute of limitations, was authorized by his co-trustees, or enough of them to constitute a majority of all the co-trustees. While this construction of the opinion would appear far less likely than that considered in Point

A, *supra*, it is believed that completeness requires a showing that even under such an interpretation a ground for granting the writ of certiorari nevertheless exists.

An interpretation of the opinion to the effect that Mr. Krueger was authorized by his co-trustees might possibly be founded on the agency language employed by the court. Thus, it is said (R. 518-519):

> "The execution of the waivers is not the act of the trustees on dissolution. We think, however, that they are bound under settled principles of the law of agency. The liquidators both can and must act through others. The principles governing their agents should not differ from those applicable to the agents of the corporation itself."

If it be true that these words imply an authorization from a majority of the trustees, it is manifest that the Circuit Court of Appeals has in effect ignored the findings of fact of the District Court, which findings were fully supported by the evidence. The District Court found that neither Mr. Hoffmann nor the other liquidating trustees authorized William C. Krueger to waive the statute of limitations, nor did they have any knowledge of the receipt, execution and filing of the Waivers (R. 488, 489).

The effect of findings of fact is the subject of Rule 52 (a) of the Rules of Civil Procedure which provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> (The full text of Rule 52 (a) is printed as Appendix F.)

There has been much confusion as to the proper interpretation of Rule 52 (a) and the decisions of various Circuit Courts of Appeal are in serious conflict.

Thus the Seventh Circuit has held that the phrase "clearly erroneous" in the Rule is merely a restatement of Mr. Justice Holmes' language in *Adamson* v. *Gilliland*, 242 U. S. 350, 352, to the effect that if there is any testimony consistent with the finding, it must be treated as "unassailable". *Santa Cruz Oil Corporation* v. *Allbright-Nell Co.*, 115 F. (2d) 604, 607; *Webb* v. *Frisch*, 111 F. (2d) 887, 888.

The Ninth Circuit now seems to be in accord with the Seventh Circuit, *Wittmayer* v. *United States*, 118 F. (2d) 808, 811, although formerly some doubt existed as to the correct interpretation of the Rule. See concurring opinion of Haney, C. J., in *Occidental Life Insurance Co.* v. *Thomas*, 107 F. (2d) 876, 879.

The Tenth Circuit enforces a rule similar to that of the Seventh although it requires substantial evidence in support of the findings to render them unassailable. *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557, 564; *Kelly* v. *Aderhold*, 112 F. (2d) 118, 119. The First and Eighth Circuits, on the other hand, declare that the "substantial evidence" rule is no longer in force. *Manning* v. *Gagne*, 108 F. (2d) 718, 719 (C. C. A. 1st); *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. (2d) 412 (C. C. A. 8th).

The Fourth Circuit holds that the findings of the lower court, "though entitled to weight, are persuasive only and not controlling." *Beckley Nat. Bank* v. *Boone*, 115 F. (2d) 513, 515.

The Eighth Circuit now adheres to the ruling of the Fourth Circuit, *Aetna Insurance Co.* v. *Kepler*, 116 F. (2d) 1, 5, though formerly the decisions had not been entirely consistent. *Storley* v. *Armour & Co.*, 107 F. (2d) 499, 505, 513; *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. (2d) 412, 415; *Missouri Pac. Transp. Co.* v. *George*, 114 F. (2d) 757, 759.

The Third Circuit seems substantially in accord with the Eighth Circuit. *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. (2d) 704, 705.

It should be noted that commentators have observed the confusion existing among the Circuit Courts of Appeals, and have suggested that the problem is one to be settled ultimately by the Supreme Court. *Scope of Review of Findings*, 2 Fed. Rules Serv. at p. 672; *Ilsen and Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 2 Fed. Rules Serv. L. R. 23, at p. 736 (abridged from 24 Minn. L. Rev. 1). The importance of settling the conflict by an authoritative interpretation of Rule 52 (a) would seem to be apparent.

The need for such interpretation is well illustrated in the present case where the Circuit Court of Appeals for the Third Circuit, assuming that it found that Mr. Krueger was authorized by his co-trustees, has clearly exceeded its power with respect to the findings of the lower court.

The District Court's findings were not only supported by substantial evidence but by the overwhelming weight of the evidence. Both Mr. Uppercu and Mr. Barrett, the co-trustees of Mr. Krueger, and Mr. Hoffmann testified without contradiction that they had no knowledge whatever of the execution of the waivers (R. 391-392, 405, 410-411). Moreover, it was not Mr. Krueger who was appointed by the liquidating trustees to handle the tax matters, but Mr. Hoffmann (R. 389-390, 405, 410, 445). The latter attended at least twenty-five or thirty conferences with government officials in order to dispose of the tax claims, whereas Mr. Krueger accompanied him merely at the first conference (R. 390-391, 444-445). Thus, the evidence indicates that not only did Mr. Krueger lack authority of any nature, but that the only authority delegated by the liquidating trustees was that vested in Mr. Hoffmann.

In the light of this record, the District Court's findings were fully supported, and the Circuit Court of Appeals was not at liberty, under Rule 52 (a) to ignore such findings.

POINT C.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a Federal question in a way probably in conflict with the decisions of this Court.

Since the Circuit Court of Appeals found against the petitioner on the First Count of the Complaint, it became necessary to decide the Second Count, relating to the amended claim for refund based on obsolescence. On the authority of *United States* v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, the court found for the respondent on the Second Count on the sole ground that the claim based on obsolescence was untimely filed. The issue, therefore, does not concern the merits of the claim, a point not decided, but rather the validity of the court's ruling that the claim was barred by the statute of limitations.

As to the merits of a claim based on obsolescence arising from the enactment of prohibition legislation, see *Plymouth Brewing & Malting Co.*, 16 B. T. A. 123 which follows, *Renziehausen* v. *Commissioner of Internal Revenue*, 31 F. (2d) 675, *aff'd*, 280 U. S. 387. In the *Plymouth* case, it was held that experiments in an endeavor to develop a process for the manufacture of near beer did not deprive the tax-

payer of the right to take its loss in the year when the property became obsolete. As the Board states, at page 129:

> "We think the abortive experiments of the petitioner in the following year are demonstrative of the uselessness of the assets rather than of their usefulness."

The applicable statute of limitations is Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, providing that claims for refund, in the case of taxes imposed by prior Acts, must be filed within four years from the time the tax was paid. (See Appendix E for text of Section 284.)

Where, as in this case, an amended claim has been filed after the time limited in the foregoing statute, such claim is proper, under the decisions of this Court, when the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim. The determinative factor is whether, in pursuance of normal administration procedure, consideration of the original claim would lead the Commissioner into the field covered by amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Prentiss Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28.

The principle set forth is in accord with the interpretation given to the Supreme Court cases by the Second Circuit in *Pink* v. *United States*, 105 F. (2d) 183, and with the interpretation formerly given by the Third Circuit itself in *Allegheny Heating Co.* v. *Lewellyn*, 91 F. (2d) 280.

To illustrate, in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the taxpayer filed a timely claim for refund which was general in nature, and did not specify grounds. After the statute of limitations had run, he filed an amendment describing the facts. The amendment was sustained since, on the filing of a general claim, the Commissioner was

led by the normal course of administrative procedure into a complete audit which necessarily put him on notice of the facts on which the amendment was based.

In *United States* v. *Prentiss & Co.*, 288 U. S. 73, on the other hand, the taxpayer filed a timely claim for refund on the ground that he should have the benefit of a special assessment under Section 327 (d) of the Revenue Act of 1918 since abnormal conditions affected his invested capital and income. In response to the Commissioner's request, the taxpayer acquiesced in the statutory net income and invested capital as set forth in a revenue agent's report. Subsequently, the taxpayer filed an untimely claim alleging undervaluation of real estate and exclusion of intangibles. Mr. Justice Cardozo, in a penetrating opinion, held the rejection of the untimely claim proper. Here, it may be noted, the taxpayer had, in his original claim, abandoned the position that there had been any error of law or fact in the assessment. The request for a special assessment under Section 327 (d) assumes the correctness of the prior assessment. Hence, as Mr. Justice Cardozo aptly points out, the original claim did not suggest the need for a search into the facts on which the untimely claim was based.

In *United States* v. *Factors & Finance Co.*, 288 U. S. 89, the timely claim did not specify any grounds. After the statute of limitations had run, an amendment set forth reasons for a special assessment under Section 210 of the Act of 1917. The amendment was held proper. In the first place, the taxpayer had not, in his original claim, abandoned other grounds, as was the case in *United States* v. *Prentiss & Co.* Furthermore, a special assessment under Section 210 differs from that under Section 327 (d) in that, under the former, the value of invested capital is important. Under the former, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the

statute. Hence, as Mr. Justice Cardozo states, the Commissioner must be deemed to have considered the question of special assessment under Section 210 when the taxpayer submitted his original claim.

In *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, a timely claim for refund demanded a special assessment under Sections 327 and 328 of the Act of 1918, placing the right to relief on the following grounds: (1) that the Commissioner was unable to determine invested capital in the ordinary way, (2) that a mixed aggregate of tangible and intangible property had been paid for in stock, and the Commissioner was unable to determine the respective values of the several classes of property, and (3) that abnormal conditions affected the taxpayer's invested capital and income. After the statute of limitations had run, an amended claim asked that if the special assessments were denied, items improperly eliminated from invested capital should be restored. The amendment was held proper since the taxpayer's grounds (1) and (2) gave the Commissioner notice that the taxpayer's invested capital may have been erroneously assessed. Under normal administrative procedure, the commissioner in considering grounds (1) and (2) would look into matters covered by the amendment.

In the instant case, the petitioners' tax returns for the fiscal years ended March 31, 1919, 1920 and 1921 claimed a loss for obsolescence caused by the enactment of prohibition legislation (R. 78-125). The report of the Government engineer, accepted and acted upon by the Government, found that the net depreciated cost of the properties of the United States Brewing Company used in the manufacture of beer was $1,667,646.82 (R. 207). These properties were sold for $735,000, resulting in a loss of $932,646.82. The engineer found, and by its acceptance of his report, the Government determined that Prohibition Legislation was the sole cause of the loss (R. 217). Never-

theless the Government allowed but $533,442.49 of the loss for the reason, as stated by the engineer, that two of the breweries were operated intermittently in experimentation with near beer (R. 206).

Original claims for refund were filed by petitioners on February 6, 1930, for the fiscal years March 31, 1919, 1920 and 1921 on the ground that the assessment and collection of the taxes paid were barred by the applicable statute of limitations (R. 31).

In considering the original claims, the Government interposed the defense of estoppel. The petitioners, to rebut the defense, filed memoranda dated August 25, 1931 and January 20, 1932 claiming that the Government was unable to prove the elements necessary to establish an estoppel (R. 331, 341). In the memoranda, these elements were discussed substantially as follows: (1) There must be a misrepresentation of an existing fact. Neither Mr. Krueger, Mr. Hoffmann, or the other trustees misrepresented any facts. (2) There must be reliance without knowledge of the true facts. The Commissioner had knowledge of Mr. Krueger's lack of authority when he, the Commissioner, rejected a power of attorney signed by Mr. Krueger. (3) There must be a change of position to the detriment of the party claiming estoppel. Although the Commissioner determined the loss on obsolescence to be $932,646.82, only $533,442.49 was allowed and the balance was disallowed on the erroneous theory that unsuccessful experiments postponed the loss. The dissolved corporation did not owe the taxes assessed against and collected from it and, therefore, without regard to the timeliness of the assessment, no taxes were due. Hence the Government could have suffered no detriment. The detriment, in fact, was suffered by the taxpayer who, after the rejection of the power of attorney of Mr. Treanor, was without representation by tax counsel.

As pointed out by the petitioners in their memoranda, it is apparent that the Commissioner, in the normal course of administrative procedure, in considering the defense of estoppel to the original claims, must necessarily ascertain whether the Government had suffered a detriment, which in turn compelled a determination as to what tax was in fact due. Such determination obviously led into the field of obsolescence.

It is apparent, therefore, that petitioners' amendments to the claims for refund, filed August 11, 1932, claiming that they were entitled to deduct the entire loss caused by Prohibition Legislation without regard to the experiments with near beer, were entirely proper, under the Supreme Court decisions cited. In considering the petitioners' timely claim, the Commissioner would, in the normal course of administrative procedure, be led into the field covered by the petitioners' amendment. The Circuit Court of Appeals for the Third Circuit, therefore, in holding the petitioners' amendments improper, has decided a question of Federal law in a way probably in conflict with the decisions of this Court.

United States v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, relied upon by the Circuit Court of Appeals, are factually distinguishable. There, the purported amendments were totally unrelated to the original claims. In the *Andrews* case, the timely claim was based on a loss due to worthlessness of stocks in two specified corporations. Consideration of this claim obviously did not lead into the field covered by the purported amendment, namely, whether a certain sum reported as a dividend was in fact the proceeds of the sale of stock of the Hanna Company.

In the *Garbutt Oil* case, the timely claim alleged two grounds for refund: (1) that a deduction should be allowed for amortization of a drilling contract, and (2) that

the taxpayer's invested capital should have been increased so as to embrace the unrecovered cost of this drilling contract. The purported amendment claimed that the taxpayer had no income whatever since it had distributed the oil it drilled in kind. As Mr. Justice Roberts observed, the original claim assumed the receipt of some income, at least, and was therefore the direct negation of the purported amendment.

This Court, in the *Andrews* and *Garbutt* cases, followed the rules established by its own earlier decisions, but distinguished the latter decisions on the facts.

It is submitted, therefore, that the decision of the Court of Appeals for the Third Circuit is probably in conflict with the decisions of this Court.

POINT D.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit and with decisions of the Court of Claims.

In *Pink* v. *United States*, 105 F. (2d) 183, the Circuit Court of Appeals for the Second Circuit had before it a case where the taxpayer filed a timely claim for refund on the ground that it was an insurance company taxable under section 246 of the Revenue Act of 1926, and should have paid at the rate of only 12½ per cent of its net income. After the statute of limitations had run, a claim for refund

was filed on the ground that the taxpayer was taxable as an insurance company and had erroneously included in its return of gross income certain fees and profits on the sale of capital assets. Judge Swan held that the untimely claim was a proper amendment since the original claim involved a determination of whether insurance was the taxpayer's predominant business, and this determination involved an investigation of the sources of income, which investigation would lead the Commissioner to the fees in question under the amendment. As the Court states, at page 187:

> "Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the commissioner in determining the merits of the original claim, the amendment is proper. Bemis Bros. Bag Co. *v.* United States, 289 U. S. 28, 53 S. Ct. 454, 77 L. Ed. 1011; United States *v.* Memphis Cotton Oil Co., 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; United States *v.* Factors & Finance Co., 288 U. S. 89, 53 S. Ct. 287, 77 L. Ed. 633. The rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. United States *v.* Andrews, 302 U. S. 517, 58 S. Ct. 315, 82 L. Ed. 398; United States *v.* Garbutt Oil Co., 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405; Marks *v.* United States, 2 Cir., 98 F. (2d) 564. We think the present case falls within the former rule."

Without reviewing the relevant facts of the present case, as outlined in the Argument under Point C, *supra*, attention is directed to the close analogy between the *Pink* case and the instant matter. In both instances the determination of the original claim involved, under normal administrative practice, an investigation which would lead to the matters described in the amended claim for refund.

While the Circuit Court of Appeals for the Third Circuit purports to base its decision on the ground that no relation exists between the amendment and the original claim, it is manifest that the Third Circuit has not adopted the same tests as those employed by the Second Circuit. The Third Circuit does not reveal how close a relationship, in its view, is requisite, but on the basis of the holding it may at least be said that the Third Circuit demands a much closer relationship than that required by the Second Circuit.

It may also be said that the present holding of the Third Circuit is, in effect, contrary to the rule of the Seventh Circuit in *United States* v. *Elgin Nat. Watch Co.*, 66 F. (2d) 344, although the factual analogy between the two cases is not as precise as that between the instant case and the *Pink* case.

In the *Elgin* case, the taxpayer filed a timely claim for refund for the entire amount of the tax paid by it. After the statute of limitations had run, it filed briefs which were considered by the Court to be amendments, in which it sought a special assessment under Section 328 of the Revenue Act of 1918. The Court sustained the amendments and, after discussing the general claims filed in *United States* v. *Factors & Finance Co.*, 288 U. S. 89, stated as follows, at page 347:

> "The original claim filed by taxpayer is of equally sweeping generality, and if the Commissioner had considered it, he would have easily discovered, as did the Board and the District Court, that taxpayer's invested capital as defined in section 328 of the statute could not be determined. It will not do to say that this fact did not occur to him, for it is quite clearly involved in the original claim which sought a refund of the entire tax. In Lewis *v.* Reynolds, 284 U. S. 281 at page 283, 52 S. Ct. 145, 146, 76 L. Ed. 293, the court said:
>
> "'* * * the ultimate question presented for decision upon a claim for refund, is whether the tax-

payer has overpaid his tax. This involves a redetermination of the entire tax liability.' "

In *Youngstown Sheet and Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.*, 293 U. S. 599, the Court of Claims had before it a timely claim for refund assigning as a specific ground deductions from gross income. After the statute of limitations had run, the taxpayer filed an amended claim seeking additional deductions which were not set forth in the original claim. The Court permitted the amendment. *United States* v. *Prentiss & Co.*, 288 U. S. 73, was distinguished on the ground that the case before the Court of Claims, unlike the *Prentiss* case, involved two claims, both on statutory grounds. Further, the issue in the original claim involved an error of law or fact or both, and not only suggested, but resulted in a complete re-audit. At page 294, the Court observes:

"There is no question that the plaintiff has overpaid its 1922 taxes; that the amount so overpaid should be returned; that a timely formal claim was before the Commissioner; that every item in the amended claim was acted upon and well known to the Commissioner before the amended claim was filed; that the Commissioner was not taken by surprise by the second claim when he took action on both claims; and that all the equities are with the plaintiff. Only by a narrow construction of the right to amend can the plaintiff be debarred from recovery."

Under the holding of the Court of Claims, the present matter becomes an *a fortiori* case. There was very little in the original claim filed in the *Youngstown* case to suggest the problems raised in the amended claim. In the present controversy, on the other hand, the Commissioner was on notice of all matters raised in the amended claim,

by virtue of the original claim and briefs submitted in connection therewith. Moreover, the Commissioner's own defense to the original claim involved a consideration of the problem presented in the amended claim.

Hence, the ruling of the Third Circuit, denying effect to the amended claim, is clearly contrary to the decision of the Court of Claims in the *Youngstown* case.

The *Youngstown* case was followed by the Court of Claims in *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686. In the latter case a timely claim for refund was filed on the basis of an "inadequate depreciation taken on the return". The taxpayer also sought to have invested capital increased on account of the cost of type and forms used in its business. After the statute of limitations had run, an amended claim was filed seeking deduction for exhaustion of the value of the leasehold. On the authority of the *Youngstown* case, the amendment was upheld.

The comparison made between the *Youngstown* case and the present case is equally applicable to the *Curran* case. Under the *Curran* decision the facts of instant case present an *a fortiori* situation.

Moreover, a conflict between the Court of Claims and a Circuit Court of Appeals on the same matter should be, it is submitted, a sufficient reason for granting a writ of certiorari. See *8 Hughes, Federal Practice* (1931), sec. 6301, fn. 2.

To summarize Point D of the argument, the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the Circuit Courts of Appeals for the Second and Seventh Circuits, and in conflict with two decisions of the Court of Claims on the same matter.

Point E.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court.

If it should be felt that the present decision of the Circuit Court of Appeals for the Third Circuit is not precisely in conflict with decisions of this Court, it is submitted that the Third Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

In *United States* v. *Andrews*, 302 U. S. 517, this Court criticized the reasoning of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.*, 293 U. S. 599, and in *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686. The court went on to say, however, at page 527:

> "We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts."

The instant case presents a situation similar to that found in the *Youngstown* and *Curran* cases. A timely claim for refund was filed on a given ground. Subsequently, and after the statute of limitations had run, an amendment was filed on another ground. While the original claim was pending, however, the Commissioner was apprised of the matters

claimed in the petitioners' amendment by reason of his consideration of his defenses to the original claim.

As indicated in the above quotation, this Court was not called upon to express an opinion on this or a similar set of facts in the *Andrews* case and therefore left the matter open.

That the question is important, and one which should be settled by this Court, is illustrated by the very fact that at least four cases have in recent years been before the Circuit Courts of Appeals and the Court of Claims involving substantially the same situation. *Pink* v. *United States*, 105 F. (2d) 183; *Youngstown Sheet & Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.* 293 U. S. 599; *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686; and the present case. Large sums were in each instance involved. It would seem reasonable to suppose that the question will frequently arise in future litigation unless the matter is settled by a definitive opinion. This Court has in the past eliminated many of the sources of litigation involved in the problem of amended claims for refund, in cases cited elsewhere in this brief. The present case involves what is perhaps the major remaining source of litigation in this field of tax law. Especially in the law of taxation, certainty should be a primary consideration. Hence, the removal of doubt on the questions here presented should be of great benefit to the taxpaying public.

Conclusion.

Several grounds have been urged in the present case as indicating that the matter is one appealing to the discretion exercised by this Court in issuing its Writ of Certiorari. It has been, and is, submitted: first, that the holding of the Third Circuit to the effect that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the corporation to a waiver of the statutes limiting the time within which Federal income and profits

taxes may be assessed, conflicts with the controlling statutes and decisions of New Jersey; second, that the Third Circuit's holding to the effect that William C. Krueger, one of the liquidating trustees, possessed implied authority from his co-trustees to waive the said statute of limitations, disregards and nullifies the findings of fact of the District Court in conflict with the proper interpretation of Rule 52 (a) of the Rules of Civil Procedure, and with the decisions of other Circuit Courts of Appeals; third, that the denial by the Third Circuit, on the ground that the claim was untimely, of the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment involved problems concerning which the government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, is a decision on a Federal question which is probably in conflict with the decisions of this Court; fourth, that by denying the petitioners' rights, under the same circumstances, the Third Circuit has rendered a decision in conflict with decisions of the Second and Seventh Circuits and of the Court of Claims; and fifth, that by denying the petitioners' rights, under the aforesaid circumstances, the Third Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

Further, it is urged that the present matter is of importance, not only to the petitioners themselves, but to the public at large. Particularly in these critical times, when the tendency is widespread to favor the government at the expense of the individual, it is important that the citizen and taxpayer be given the full protection to which he is by law entitled. Moreover, the questions here presented have been a fruitful source of costly litigation, and, it is believed they will continue to be, unless this Court resolves the confusion which seems to exist on the points involved.

Your petitioners ask, therefore, that this Court grant a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, as prayed in the foregoing petition.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Counsel for Petitioners.